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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**IN RE FACEBOOK PPC ADVERTISING  
LITIGATION**

**This Document Relates To:**  
**All Actions.**

Master File No. C 09-03043 JF

**JOINT CASE MANAGEMENT  
CONFERENCE STATEMENT**

**Date: May 7, 2010**  
**Time: 9:00 a.m.**  
**Courtroom: 3, 5<sup>th</sup> Floor**  
**Judge: Honorable Jeremy Fogel**

1 Pursuant to Civil Local Rule 16-9, Plaintiffs and Defendant Facebook, Inc. (“Defendant” or  
2 “Facebook”) respectfully submit this updated Joint Case Management Conference Statement. On  
3 November 23, 2009, and on April 29, 2010 the parties, through their respective counsel of record,  
4 discussed the issues in Federal Rules of Civil Procedure 16(b) and 26(f). This Joint Case Management  
5 Statement reflects the matters on which they agree and expresses their respective views on the issues on  
6 which they disagree.

#### 7 **INTRODUCTORY STATEMENT**

8 This is a proposed class action. Plaintiffs filed their Consolidated Class Action Complaint  
9 (“CCAC”) on November 20, 2009. The CCAC asserts statutory and common law claims for relief and  
10 seeks a variety of legal remedies. Defendant denies that it engaged in any wrongful contact under  
11 statutory or common law. On April 22, 2010, the Court entered an Order Granting In Part And Denying  
12 In Part Defendant’s Motion To Dismiss And Denying Motion to Strike.

#### 13 **1. JURISDICTION AND SERVICE**

14 This Court has jurisdiction pursuant to 28 U.S.C. § 1332(d). This is a proposed class action  
15 involving more than 100 class members. Defendant does not agree to this estimate of proposed class  
16 members. Plaintiffs allege that members of the proposed class are citizens of a state different from  
17 Defendant, and Plaintiffs further allege that the amount in controversy, in the aggregate, exceeds the  
18 sum of \$5 million exclusive of interest and costs.

19 All known parties have been served.

#### 20 **2. FACTUAL SUMMARY AND DISPUTES**

##### 21 **A. PLAINTIFFS’ STATEMENT.**

22 Plaintiffs bring this class action suit against Facebook for improper charges that they and  
23 members of the Class incurred in connection with advertising placed on Defendant’s website at  
24 www.facebook.com during the period of January 1, 2006 to the present. Plaintiffs contracted with  
25 Facebook to pay Facebook a fee each time a person “clicked” on Plaintiffs’ advertisements on the  
26 Facebook website in a conscious attempt to view the advertisement. Plaintiffs and Facebook regarded  
27 such action (by a Facebook user) as a valid, or billable, “click” for which advertisers were contractually

1 obligated to pay Facebook a fee in accordance with their contract. Plaintiffs allege that Facebook  
2 systematically fails to limit charges to valid clicks. Instead, Plaintiffs allege that advertisers have been  
3 and continue to be unlawfully charged for and presently pay for a range of various types of invalid  
4 clicks.

5 Plaintiffs further allege that Defendant's conduct amounts to a violation of California's Unfair  
6 Competition Law (Cal. Bus. & Prof. Code §17200, *et seq.*), as well breach of contract. Plaintiffs also  
7 bring a claim for unjust enrichment. Plaintiffs seek a declaratory judgment and restitution and equitable  
8 relief on these claims.

9 **B. DEFENDANT'S STATEMENT.**

10 Plaintiffs have no viable claims because Facebook has consistently applied reasonable methods  
11 to detect and screen for the "invalid" and "fraudulent" clicks that are the basis of Plaintiffs' claims. To  
12 the extent that there are some "invalid" or "fraudulent" clicks that could not have been screened despite  
13 Facebook's efforts, Plaintiffs (and the proposed class members) have expressly disclaimed any claims  
14 related to such clicks by agreeing to Facebook's terms of use.

15 The Court has now recognized that Plaintiffs do not have viable claims with respect to any  
16 allegedly wrongful clicks that originate from third-party sources. While the Court did not dismiss as a  
17 matter of law Plaintiffs' claims regarding invalid clicks that originate from Facebook's own activities,  
18 Facebook believes it will prevail on these claims on the merits. Among several other reasons, Facebook  
19 has taken reasonable steps consistent with any contractual or other legal obligation it might have to  
20 screen for these sorts of alleged invalid clicks, which comprise a tiny portion of the clicks originally  
21 alleged in this case.

22 In addition, Facebook believes that there are significant issues that will prevent class  
23 certification. As the Court has recognized in its Order on Facebook's Motion to Dismiss, any potential  
24 liability in this case would depend on the specific nature and purpose of each alleged invalid click. The  
25 legal and factual inquiries would thus vary greatly from one category of plaintiffs to the next and from  
26 one category of clicks to the next. Because questions of law and fact do not predominate throughout  
27 Plaintiffs' purported class, class treatment of their claims is improper.

1           **3.     LEGAL ISSUES**

2           A.     Parties' Statement

- 3           a.     Whether Defendant's conduct as alleged herein violated the UCL;
- 4           b.     Whether Defendant's conduct breached the express terms of the contract with
- 5                 Plaintiffs;
- 6           c.     Whether Defendant's conduct breached the implied covenant of good faith
- 7                 and fair dealing;
- 8           d.     Whether as a result of the conduct alleged herein, Defendant has unjustly
- 9                 enriched itself;
- 10          e.     Whether Plaintiffs have waived their claims and whether they have properly
- 11                 mitigated their alleged damages;
- 12          f.     Whether a class can be certified under Rule 23; and
- 13          g.     Whether Plaintiffs and Class members are entitled to damages, restitution,
- 14                 injunctive relief and declaratory relief.

15           **4.     MOTIONS**

16          A.     Prior Motions

17           Defendant filed a motion to dismiss on December 18, 2009. On April 22, 2010, the Court

18           granted the motion in part without prejudice and denied the motion in part. Plaintiffs intend on filing an

19           Amended Consolidated Complaint on or before May 22, 2010.

20          B.     Pending Motions

21           There are no pending motions.

22          C.     Anticipated Motions

23           Plaintiffs intend to file a motion for class certification and a motion for summary judgment.

24           Defendant believes it is likely that another motion to dismiss will be necessary with respect to the

25           Amended Complaint to be filed on or before May 22, 2010. In addition, Defendant intends to move to

26           bifurcate discovery and move for summary judgment.

27           **5.     AMENDMENT OF PLEADINGS**

          The parties propose the deadline for amendment of pleadings be August 1, 2010.

1           **6.       EVIDENCE PRESERVATION**

2           The parties are aware of their obligation to preserve relevant evidence, including electronically  
3 stored information, and have taken steps to comply with their obligations.

4           **7.       DISCLOSURES**

5           Plaintiffs served their Initial Disclosures on February 26, 2010. Defendant intends to serve its  
6 Initial Disclosures on or before May 14, 2010.

7           **8.       DISCOVERY**

8           A.       Status

9           Plaintiffs served their First Set of Requests for Production on February 18, 2010. Facebook has  
10 not answered these requests. Before the Court's April 22, 2010 ruling, Plaintiffs agreed to limit the  
11 scope of their requests. Now that it is clear that at least some of Plaintiffs' claims survive, Plaintiffs  
12 believe that they should be permitted to proceed with discovery without limitation.

13           Facebook believes that discovery should not proceed until the legal sufficiency of Plaintiffs'  
14 anticipated Amended Complaint (to be filed on or before May 22) is determined. Alternatively, to the  
15 extent the Court feels some initial discovery is appropriate, Defendant believes that (i) discovery should  
16 be limited to a mutual exchange of click data related to the named Plaintiffs' advertisements, until the  
17 anticipated Motion to Dismiss Plaintiffs' Amended Complaint is resolved, (ii) thereafter, discovery  
18 should be limited to discovery on class certification issues only, and (iii) full merits discovery should be  
19 allowed to proceed only if the Court certifies a class.

20           B.       Scope of Discovery

21           Plaintiffs will seek discovery related to Defendant's conduct in connection with its pay-per-click  
22 advertising services, including its technological infrastructure, methods and practices for billing  
23 advertisers, and representations it made to advertisers regarding its advertising services. Plaintiffs  
24 reserve the right to seek discovery on additional issues as necessary.

25           Facebook will be seeking discovery of Plaintiffs' server logs and other methods for tracking and  
26 evaluating advertising clicks, all communications with Facebook and other Facebook customers,  
27 Plaintiffs' use of other online advertising, all postings to websites regarding Facebook services, and

1 Plaintiffs' alleged damages. Facebook believes this discovery directed at the named Plaintiffs should  
 2 proceed as part of class certification discovery because it relates directly to the typicality and adequacy  
 3 requirements of Rule 23. Facebook reserves its right to seek additional discovery as necessary.

4 C. Proposed Discovery Plan

5 Plaintiffs oppose any formal bifurcation of class or merits discovery on the grounds that the  
 6 discovery here is inextricably intertwined between class issues and merits issues. For instance,  
 7 Facebook's representations, its processes for filtering invalid clicks, and billing practices, among other  
 8 things, are relevant to both class certification (namely, commonality and predominance) as well as to the  
 9 merits. Courts have recognized that because "information about the nature of the claims on the merits  
 10 and the proof that they require is important to deciding certification . . . arbitrary insistence on the  
 11 merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class  
 12 certification practice emphasizes." Manual for Complex Litigation (Fourth) § 21.14 (2006). Further,  
 13 Facebook has thus far failed to provide Plaintiffs with any details of its proposed bifurcation plan.

14 Facebook will move to bifurcate class and merits discovery, given the substantial burden that full  
 15 merits would impose on Facebook. *See Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec.*  
 16 *Litig.)*, 471 F.3d 24, 41 (2d Cir. 2006) ("[A] district judge has ample discretion to circumscribe . . . the  
 17 extent of discovery concerning Rule 23 requirements . . . in order to assure that a class certification  
 18 motion does not become a pretext for a partial trial of the merits."); MANUAL FOR COMPLEX LITIGATION  
 19 (FOURTH) § 21.14 (2009) ("Discovery relevant only to the merits delays the certification decision and  
 20 may ultimately be unnecessary. Courts often bifurcate discovery between certification issues and those  
 21 related to the merits of the allegations.").

22  
 23 //

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The following is the parties' view of the discovery plan and briefing schedule for class certification:

| DEADLINE OR EVENT   | FACEBOOK'S DATES OR POSITION   | PLAINTIFFS' DATES OR POSITION  |
|---|--|--|
| Opening of Initial Phase of Fact Discovery                        | Non-expert discovery should be bifurcated into class and merits, and should not commence until the Motion to Dismiss is adjudicated and the Amended Complaint is settled.  | Non- Expert discovery (class and merits) should commence immediately.            |
| Completion of Initial Phase of Fact Discovery                     | <b>Six months</b> from commencement of non-expert discovery (the time frames proposed herein are subject to Facebook's position that the initial discovery period should be limited to class certification issues) | <b>Six months</b> from commencement of non-expert discovery                      |
| Deadline to File Any Motion for Class Certification               | <b>Eight months</b> from commencement of non-expert discovery  | <b>Eight months</b> from commencement of non-expert discovery                    |
| Deadline to File Any Opposition to Motion for Class Certification | <b>Thirty days</b> after filing of motion for class certification.   | <b>Thirty days</b> after filing of motion for class certification.               |
| Deadline to File Any Reply on Motion for Class Certification      | <b>Thirty days</b> after filing of opposition to motion for class certification.   | <b>Thirty days</b> after filing of opposition to motion for class certification. |
| Class Certification Hearing                                       | At the Court's convenience.  | At the Court's convenience.  |

## 9. CLASS ACTIONS

Plaintiffs believe their case is a paradigmatic one for class certification as it is based on a uniform contract that will be susceptible to common proof for liability and damages. This case is brought under FRCP 23(a) and (b)(3). The class is defined as: All persons and/or entities in the United

1 States who paid money to Facebook, Inc. for cost-per-click advertising from January 1, 2006 to the  
2 present.

3 Consistent with the schedule above, Plaintiffs propose eight months from the date discovery  
4 commences as the deadline for filing their class certification motion.

5 Facebook intends to mount a vigorous opposition to any motion for class certification. Facebook  
6 believes that Plaintiffs' claims are not amenable to class treatment for a number of reasons as set forth in  
7 its Statement above.

#### 8 **10. RELATED CASES**

9 The case captioned *Price v. Facebook, Inc. et al.*, Case No. CV09-03519 AG (HRLx) has been  
10 related to and consolidated with *RootZoo v. Facebook, Inc. et al.*, Case No. CV09-03043 AG (HRLx).  
11 As part of the CCAC, Plaintiffs effectively dismissed the case captioned *Unified ECM v. Facebook*,  
12 Case No. CV09-03430-JF. Plaintiffs also added a new plaintiff and new lawsuit to the CCAC.  
13 Facebook objects to this new plaintiff as a violation of the Court's prior Order permitting consolidation,  
14 and reserves its rights to seek all available remedies for this improper addition of a new plaintiff to the  
15 CCAC.

#### 16 **11. RELIEF**

17 Plaintiffs seek legal and equitable relief, including damages and recession.

#### 18 **12. SETTLEMENT AND ADR**

19 The parties, through their counsel, participate in the ADR phone conference on March 2, 2010.  
20 The parties believe that, until the pleadings are settled, it is difficult to assess the potential utility of each  
21 ADR process. A follow up ADR phone conference is currently scheduled for June 2, 2010.

#### 22 **13. CONSENT TO MAGISTRATE JUDGE**

23 The parties do not consent to proceed before a Magistrate Judge for all purposes.

#### 24 **14. OTHER REFERENCES**

25 The parties do not believe this case is suitable for other references at this time.  
26  
27



## 15. NARROWING OF ISSUES

At this stage in the proceedings, the parties are unaware of any issues that can be narrowed by agreement or motion, other than the anticipated motions set forth above. The parties agree to continue to meet and confer regarding these issues and to inform this Court as applicable in the event discovery indicates agreement may be reached on the scope of any issues or reveals any additional basis to narrow the issues through motion practice.

## 16. EXPEDITED SCHEDULE

The parties agree this case is not appropriate for an expedited or streamlined procedure.

## 17. SCHEDULING

The following is the view of the parties for a case schedule for proceedings after the class certification ruling:

| DEADLINE OR EVENT                | FACEBOOK'S DATES OR POSITION   | PLAINTIFFS' DATES OR POSITION   |
|----------------------------------|--|---|
| Completion of All Fact Discovery | All non-expert discovery should be completed within <b>six months</b> from the class certification order. This assumes that the initial discovery period is limited to class certification issues only. If full merits is allowed to proceed before a class certification ruling, then the post-certification discovery period (if any) should be limited to <b>three months</b> . | All non-expert discovery should be completed within <b>six months</b> from the class certification order. |
| Completion of Expert Discovery   | An additional <b>three months</b> from the close of fact discovery as set forth above.   | <b>Nine months</b> from class certification discovery.  |
| Deadline for Dispositive Motions | An additional <b>three months</b> from the close of expert discovery as set forth above.   | <b>Twelve months</b> after the certification order  |

| DEADLINE OR EVENT                 | FACEBOOK'S DATES<br>OR POSITION  | PLAINTIFFS' DATES<br>OR POSITION   |
|-----------------------------------|--|--|
| Hearing on Dispositive<br>Motions | <b>At the Court's convenience</b>  | <b>At the Court's convenience</b>  |
| Pre-trial Conference              | <b>One month</b> after Court's<br>ruling on dispositive motions,<br>or as soon as possible based on<br>the Court's schedule. | <b>One month</b> after Court's<br>ruling on dispositive motions,<br>or as soon as possible based on<br>the Court's schedule. |
| Trial                             | <b>Two weeks</b> after pre-trial<br>conference.  | <b>Two weeks</b> after pre-trial<br>conference.  |

### 18. TRIAL

The parties agree that trial will take five to seven days.

### 19. DISCLOSURE OF INTERESTED ENTITIES

The parties intend to file their Certificates of Interested Entities promptly.

### 20. OTHER MATTERS

At this time, the parties do not have any additional matters that should be raised.

1 DATED: April 30, 2010

Respectfully submitted,

2 **SHUBLAW LLC**

3  
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5  
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10 DATED: April 30, 2010

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15  
16  
17 I attest that concurrence in the filing of this document has been obtained from Whitty Somvichian for  
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